Supreme Court, U.S.
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No. 98-——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

v.

RONALD MOCK,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of Georgia

---

PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

37 pp

QUESTION PRESENTED

Whether the Georgia Court of Appeals committed reversible error under *Norfolk & Western Ry. Co.* v. *Liepelt,* 444 U.S. 490 (1980), when it upheld the trial court's refusal to use petitioner's clear and unambiguous jury charge to instruct the jury in a Federal Employers Liability Act ("FELA") case that damages awarded for lost wages must be based on net, after tax wages rather than gross wages, and instead expressly instructed the jury not to subtract for income taxes in reaching a verdict.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The only parties to this proceeding are the petitioner Central of Georgia Railroad Company and the respondent Ronald Mock.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Central of Georgia Railroad Company states that it is a subsidiary of Norfolk Southern Railway Company, which is in turn a subsidiary of Norfolk Southern Corporation.

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Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of Georgia

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Central of Georgia Railroad Company respectfully requests that a writ of certiorari issue to review the judgment and decision of the Court of Appeals of Georgia.

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia (App. at 1a-12a) is reported at 499 S.E.2d 673. The order of the Court of Appeals of Georgia (App. at 13a) denying petitioner's motion for reconsideration is not reported. The order of the Supreme Court of the State of Georgia (App. at 14a) denying petitioner's petition for certiorari is not reported. The order of the Supreme Court of the State of Georgia (App. at 15a) denying petitioner's motion for reconsideration of petition for certiorari is not reported. The judgment of the State Court, Bibb County, Georgia against petitioner entered upon a jury's verdict (App. at 16a) is not reported.

JURISDICTION

The decision of the Court of Appeals of Georgia was filed on March 10, 1998 (App. at 1a), and the Court of Appeals' order denying petitioner's motion for reconsideration was filed March 25, 1998 (App. at 13a). The Supreme Court of the State of Georgia entered its order denying petitioner's petition for certiorari on July 2, 1998 (App. at 14a), and entered its order denying petitioner's motion for reconsideration on the petition for certiorari on July 31, 1998 (App. at 15a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Section 1 of the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51; see also 45 U.S.C. § 52.

STATEMENT OF THE CASE

1. Respondent Ronald Mock was employed as a railroad conductor for petitioner Central of Georgia Railroad Company on September 27, 1991. On that date, respondent attempted to remove an end-of-train device ("EOT device") from the coupler on the rear of a train. An EOT device is a portable device that permits the train engineer remotely to monitor air pressure. The device is installed on the rear of the train and is coupled directly

to the air brake system. The EOT device weighs approximately 30-35 pounds. Ordinarily, it can readily be removed from the train by one person who lifts it up and lowers it with both hands to waist level for carrying. See *Central of Georgia R.R. Co.* v. *Mock,* 499 S.E.2d 673, 675 (Ga. Ct. App. 1998).

When respondent removed the EOT device, he let go of one end with his right hand so that he could grab the attached air hose. As respondent attempted this balancing maneuver, he lost his footing, which caused the free end of the EOT device to swing down and hit his arm. As a result, he injured his shoulder. *Id.*

2. Respondent filed suit in the State Court of Bibb County, Georgia under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, alleging that his shoulder injury resulted from petitioner's negligence. The FELA creates a cause of action for injuries suffered by a railroad employee caused by a railroad's negligence. Relevant to this petition, a plaintiff under the FELA may recover damages for past and future wage loss, on an after-tax basis, upon proving with reasonable certainty the quantum of such damages. *Norfolk & Western Ry. Co.* v. *Liepelt,* 444 U.S. 490, 494 (1980). An award of damages under the FELA is intended solely to compensate an injured plaintiff; therefore, punitive damages are not authorized under the Act.

In the damages phase of the trial, respondent presented his own evidence of "lost wages, impairment of his future earning capacity, his permanent physical impairment, and his pain and suffering." *Central of Georgia,* 499 S.E.2d at 677. With respect to his claim for future lost wages, respondent presented evidence from which both gross wage loss and net wage loss could be determined, including his 1994 and 1995 W-2s and tax returns. (Trial Transcript ("Tr.") at 248). In addition, an economist testified as to respondent's lost future income based on a 24 percent

physical impairment, and further testified that as a result of his current impairment respondent loses approximately $650 in wages per month because he needs to rest his shoulder. (Tr. at 257 & 271.) Respondent testified that he currently is employed as an engineer with petitioner, and in that capacity he is earning nearly two times the amount of money he earned prior to his injury. (Tr. at 247-53.) Respondent's current supervisor testified that respondent works 28 out of 30 days each month as an engineer. (Tr. at 329.) In closing arguments, counsel for respondent claimed lost wages to date of $104,000 gross or $83,000 net. (Tr. at 363.)

During trial, petitioner requested the following jury instruction regarding the proper calculation of lost earnings:

> [I]f you render a money award in this case . . . you should take into consideration the fact that any award rendered by you would not be subject in the hands of plaintiff to income taxes. Thus, any verdict in favor of the plaintiff for loss of earnings should be calculated on the basis of his net earnings, that is, the earnings left to him after the payment of income taxes.

The trial court refused to give petitioner's instruction, and instead submitted respondent's charge, which instructed the jury that:

> [A]ny amounts that you allow for damages shall not be subject, incidentally, to income tax; therefore, you should neither add *nor subtract* for income tax when arriving at your verdict.

Central of Georgia, 499 S.E.2d at 678 (emphasis added). Thus, the jury was never instructed to award *net,* rather than *gross,* lost wages, and in fact, was explicitly instructed *not* to subtract income taxes from lost wages.

On April 2, 1992, the jury returned a verdict and awarded respondent $755,000. (App. at 16a.) Judgment was entered against petitioner on the same day. On July 30, 1997, the trial court denied petitioner's post-trial motions.

3. On March 10, 1998, the Georgia Court of Appeals affirmed the jury's verdict and award. In upholding the award, the Court of Appeals stated, "[*Norfolk & Western Ry. Co.* v. *Liepelt*, 444 U.S. 490 (1980),] does not *require* that income taxes be subtracted in arriving at an award." *Central of Georgia*, 499 S.E.2d at 678. The court reasoned that, informing the jury that the award would not be subject to income taxation, "negates the necessity of subtracting income taxes from any award of past or future lost wages." *Id.*

On March 25, 1998, the Court of Appeals denied petitioner's Motion for Reconsideration. (App. at 13a.) The Supreme Court of the State of Georgia denied review on July 2, 1998 (App. at 14a), and denied petitioner's motion for reconsideration on July 31, 1998, with two Justices dissenting (App. at 15a).

REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision in this case—upholding the trial court's refusal to instruct the jury in a FELA action that damages awarded for lost wages must be based solely on net, after tax wages rather than gross wages—directly conflicts with settled federal law as established by this Court in *Norfolk & Western Ry. Co.* v. *Liepelt*, 444 U.S. 490 (1980). Specifically, the issue in this Court is whether the Georgia state court erred when it refused to submit petitioner's requested instruction on damages, which, consistent with *Liepelt*, clearly would have conveyed the following important information to the jury:

> [I]f you render a money award in this case . . . you should take into consideration the fact that any award

> rendered by you would not be subject in the hands of plaintiff to income taxes. Thus, any verdict in favor of the plaintiff for loss of earnings should be calculated on the basis of his net earnings, that is, the earnings left to him after the payment of income taxes.

Instead, the trial court charged the jury with the following confusing and contradictory instruction: "Any amounts you allow for damages shall not be subject [] to income tax, therefore, you should neither add *nor subtract* for income tax when arriving at your verdict." *Central of Georgia*, 499 S.E.2d at 678 (emphasis added). Significantly, petitioner's proposal clearly would have instructed the jury that, in calculating damages for lost earnings, it *must* subtract taxes from gross earnings; in direct contrast, the trial court's instruction explicitly dictated to the jury that it must not subtract taxes in arriving at an award. The state court's instruction is flatly inconsistent with this Court's mandate in *Liepelt* and must be presumed to have had a concrete impact on the jury's ability correctly to assess and award damages under the FELA in this case. Because the law is clear and the error is obvious, this case is particularly suited for summary reversal by this Court, which would be wholly consistent with this Court's treatment of similar FELA cases in the past.

1. This case presents an important federal question, which was unequivocally answered by this Court nearly 20 years ago. As a general matter, the Court repeatedly has recognized that in enacting FELA one of Congress's primary goals was to create a uniform, national system for allocating fairly financial responsibility for injuries suffered by railroad employees as a consequence of the railroad's negligence. See, e.g., *Liepelt*, 444 U.S. at 493 n.5; *Davis* v. *Virginian Ry. Co.*, 361 U.S. 354, 355 (1960); *Brown* v. *Western Ry.*, 338 U.S. 294, 295-96 (1950). As a result, "[i]t has long been settled that questions concerning the measure of damages in an FELA action are federal

in character." *Liepelt*, 444 U.S. at 493; *Monessen Southwestern Ry. Co.* v. *Morgan*, 486 U.S. 330, 335 (1987); *Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U.S. 486, 491 (1916); *Michigan Central R.R. Co.* v. *Vreeland*, 227 U.S. 59, 66 (1913). Consequently, the propriety of jury instructions relating to the measure of damages is a federal question. *Monessen Southwestern Ry. Co.*, 486 U.S. at 340; *St. Louis Southwestern Ry. Co.* v. *Dickerson*, 470 U.S. 409, 411 (1985) (citing *Liepelt*, 444 U.S. at 493).

Not only does this case present a question long recognized as distinctly federal in character, but also it presents the *precise* question this Court already deemed important enough to decide in *Liepelt*. 444 U.S. 490. In *Liepelt*, the Court resolved the identical federal question presented in this case, when it granted certiorari to resolve two important issues: (1) whether the proper measure of damages for lost wages under the FELA should be net of taxes, *i.e.*, whether a jury should subtract taxes on earnings from gross wages to calculate actual employee losses; and (2) whether the defendant in a FELA action is entitled to submit to the jury a damages instruction that clearly delineates how a damage award is treated under the tax code. The Court answered both of these questions in the affirmative.

First, the Court considered how the jury should treat *taxes on earnings* in order to calculate an appropriate damage award to compensate a FELA plaintiff for *actual* losses. Recognizing the fundamental precept that compensatory damages are intended to place a plaintiff in the same position he or she would have occupied absent any injury, see *Milwaukee and St. Paul Ry. Co.* v. *APMS*, 91 U.S. 489, 492 (1875), the Court held:

> The amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government. It is his after-tax in-

> come, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. *It follows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies.*

Liepelt, 444 U.S. at 493-94 (emphasis added); see also *Jones & Loughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523, 534 (1983) ("[T]he injured worker's lost wages would have been diminished by state and federal income taxes. Since the damages award is tax-free, the relevant stream is ideally of *after-tax* wages and benefits.") (citations omitted). Thus, the Court concluded that after-tax earnings, rather than gross earnings, correspond to *actual* losses, and therefore, in order to calculate an appropriate compensatory award under the FELA, a jury must be provided with evidence relevant to the plaintiff's after-tax earnings. *Liepelt*, 444 U.S. at 494-95. Accordingly, this Court reversed the rulings below for refusing to admit such evidence.

Second, the Court considered how the jury should treat *taxes on damages*—a wholly different tax consideration than the one relevant to the first holding—in order to calculate an appropriate damage award. In this regard, the Court held that it was reversible error to refuse to use a brief and "easily understood" instruction to inform the jury that damage awards are not taxed, and therefore, the jury should not inflate actual losses based on the mistaken belief that the award is taxable. *Id.* at 496-98.

Thus, *Liepelt* contemplates two distinct steps in calculating damages. First, the jury calculates *actual* lost wages on an after-tax basis, *i.e.*, tax on earnings must be subtracted from gross earnings, to "make the plaintiff whole." Second, having calculated actual losses, the jury should not inflate the actual loss award based on an erroneous assumption that the award will be taxed. To ensure that a jury understands the proper measure of damages and is

able to make an informed calculation of damages, the Court held that it is reversible error for the trial court to refuse to permit evidence to be introduced that would permit an after-tax earnings calculation to be made. See *id.* at 496 n.10 ("subtractions [for taxes that the plaintiff would have paid] are required in order to determine 'the pecuniary benefits which the beneficiaries might have reasonably received' ") (citation omitted). Similarly, the Court held that it is error to refuse to use a concise, "easily understood" instruction to explain to the jury how it should treat the tax issues in calculating an award. See *id.* at 498 (requiring the use of a defendant's instruction if it "eliminate[s] an area of doubt or speculation that might have an improper impact on the computation of the amount of damages"). Thus, the primary understanding of *Liepelt*, read as a whole, was "to eliminate from the deliberations of juries 'an area of doubt or speculation that might have an improper impact on the computation of the amount of damages.' " *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486-87 (1981) (quoting *Liepelt*, 444 U.S. at 498).

The Georgia Court of Appeals, however, completely misunderstood and confused *Liepelt's* two holdings. In affirming the lower court's refusal to use petitioner's jury instruction on the tax issues, the appeals court stated:

> *Liepelt does not require that income taxes be subtracted in arriving at an award. . . . Liepelt* holds that it is error to refuse a requested instruction that the jury's award of damages would not be subject to income taxation. *Giving this charge negates the necessity of subtracting income taxes from any award of past or future lost wages since the jury is instructed that its award will not be taxed.*

Central of Georgia, 499 S.E.2d at 678 (emphasis added) (citations omitted). The Court of Appeals' first unambiguous statement, that *Liepelt* does not require the jury to subtract taxes in arriving at an award, flatly ignores

the first holding in *Liepelt*, which dictates that income taxes must be subtracted from gross wages to derive actual lost wages. Moreover, the appeals court repeats its prohibition against subtracting taxes by explaining that an instruction to the jury that the award is not subject to taxation "negates the necessity of subtracting income taxes from any award of past or future lost wages." In other words, according to the Georgia Court of Appeals' confusing analysis, the *Liepelt* jury instruction—that damage awards are not subject to taxation—is made *in lieu of* subtracting taxes from lost wages. Not only does the Court of Appeals completely confuse and contradict *Liepelt's* two distinct holdings on how correctly to calculate damages in light of the tax code, it does violence to this Court's underlying holding that a jury is entitled to clear, unambiguous instructions so that it can make an informed calculation of those damages.

By affirming the trial court's jury instruction, the Court of Appeals obviously concluded that the instruction was consistent with its understanding of *Liepelt* as prohibiting the subtraction of income taxes from past or future lost wages. See *Central of Georgia*, 499 S.E.2d at 678 ("According to Central, [*Liepelt*] requires that income taxes be subtracted in arriving at the award, whereas the trial court's charge prohibits subtraction. We disagree with Central's interpretation of *Liepelt*."). Indeed, the plain language of the jury instruction required the court to so hold in order to affirm the award in this case: " '[Y]ou should neither add *nor subtract* for income tax when arriving at your verdict.' " *Id.* Based on the unambiguous language of the charge, the jury must have believed that it was forbidden from subtracting taxes from gross wages. Consistent with the first holding in *Liepelt*, the jury was presented with evidence about respondent's after-tax earnings. However, it was not given proper instructions on how to use that evidence in arriving at an award. Indeed, the trial court effectively instructed the jury to

ignore that evidence by expressly ordering the jury not to subtract taxes in calculating an award. Thus, the jury instruction on its face produced precisely the result prohibited by *Liepelt*.

In sum, the Court of Appeals' decision to affirm the trial court's refusal to use petitioner's jury charge resulted in a jury charge that (i) instructed the jury to calculate damages in precisely the opposite way than the method mandated by the first holding in *Liepelt*; and (ii) lacked the clarity mandated by the second holding in *Liepelt*. Thus, the state court below has decided an important question of federal law in a way that directly conflicts with this Court's decision in *Liepelt* and undermines the national uniformity requirement of the FELA. Accordingly, this case presents compelling reasons for this Court summarily to reverse the judgment below. See *Dickerson*, 470 U.S. at 412 (summarily reversing state court of appeals for upholding trial court's refusal to instruct jury in a FELA case that its award should reflect the present value of future losses, contrary to this Court's decision in *Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U.S. 486 (1916)).

2. The decision by the Georgia state court also conflicts with the law in a majority of federal circuits. Most of the federal circuit courts that have considered the issue have expressly recognized that *Liepelt* requires juries to *subtract* income taxes from lost wages in calculating an award under FELA. See, e.g., *Davis* v. *Little*, 851 F.2d 605, 611 (2d Cir. 1988) ("jury must be instructed to deduct future income taxes from its determination of the amount of future lost wages"); *Dixon* v. *CSX Transp., Inc.*, 990 F.2d 1440, 1444 (4th Cir.), *cert. denied*, 510 U.S. 915 (1993) (upholding jury instruction that jury should reduce damages for lost wages to reflect anticipated income taxes); *Barnes* v. *United States*, 685 F.2d 66, 69 (3rd Cir. 1982) ("award for lost earnings must be reduced by income taxes in FELA action"); *Kirchgessner* v. *United States*, 958 F.2d 158, 161 (6th Cir.

1992) ("income tax deductions" proper in awards under the FELA); *Oddi* v. *Ayco Corp.*, 947 F.2d 257, 267 (7th Cir. 1991) ("the Supreme Court has approved the practice of reducing the award by the amount the party would have paid in income taxes on the relevant earnings"); *Harden* v. *United States*, 688 F.2d 1025 (11th Cir. 1982) (*Liepelt* requires deduction of taxes). Indeed, many federal circuit courts have extended the *Liepelt* rule to non-FELA cases. See, e.g., *Kirchgessner*, 958 F.2d at 160 (finding error for failure to deduct for income taxes in wrongful death action under Federal Tort Claims Act); *Flannery* v. *United States*, 718 F.2d 108, 111 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984) (extending *Liepelt* to Federal Tort Claims Act suit); *Harden*, 688 F.2d at 1029 (same); *Fanetti* v. *Hellenic Lines, Ltd.*, 678 F.2d 424, 431 (2d Cir. 1982), *cert. denied*, 463 U.S. 1206 (1983) (extending *Liepelt* to Longshoremen's and Harbor Worker's Compensation Act). In short, the federal courts generally have had no problem understanding that *Liepelt* requires the jury to deduct income taxes from gross wages to determine actual losses. But see *Ybarra* v. *Burlington N., Inc.*, 689 F.2d 147, 153-54 (8th Cir. 1982) (upholding jury charge instructing jury that it "should not increase *or decrease* the amount of the award because of federal taxes").

The decision of the Georgia Court of Appeals reflects a broader state court antipathy to the rule in *Liepelt*. State courts traditionally have been reluctant to instruct juries about the tax-free nature of damage awards fearing that income taxes are too speculative or complex for a jury calculation and that such a charge would open a "Pandora's Box" of collateral considerations. See Todd C. McKee, *Klawonn v. Mitchell: Does a Refusal to Instruct a Jury That Wrongful Death Damages are Excluded from Income Taxation Make the Jury's Task Simpler or More Difficult?*, 19 Am. J. Trial Advoc. 211, 215-16 (1995); Lawrence Frolik, *The Convergence of*

I.R.C. S. 104(A)(2), Norfolk & Western Ry. Co. v. Liepelt and Structured Tort Settlements: Tax Policy "Derailed", 51 Fordham L. Rev. 565, 589 (1983).[1] To be sure, state courts are free in cases arising under state law to apply this preference. What a state court cannot do, however, is what the Georgia Court of Appeals did here—refuse to follow *Liepelt even in a FELA action.*

The tax consequences in a FELA action now depend on geography. In Georgia state court and the Eighth Circuit, juries are explicitly instructed *not* to subtract taxes in calculating lost wages. *Central of Georgia,* 499 S.E.2d at 678; *Ybarra,* 689 F.2d at 153-54. Thus, in those jurisdictions plaintiffs essentially obtain a windfall by obtaining taxes that, absent any injury, would have been paid to the government. Other courts, including the Eleventh Circuit which includes Georgia, recognize—consistent with *Liepelt*—that it is reversible error to refuse a defendant's clear instruction that lost wages must be calculated on an after-tax basis. See, e.g., *Davis,* 851 F.2d at 611; *Dixon,* 990 F.2d at 1444-45. In those circuits, consistent with this Court's ruling, plaintiffs in a FELA action are entitled only to an amount of compensation that would put them in precisely the same position they would have been absent the injury. Neither plaintiffs *nor* defendants must pay taxes on that amount. Thus, the size of a damage award in a case brought in Georgia depends on whether the suit is filed in state court or across the street in federal court. Accordingly, the Court should

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[1] *See also* Laura Sager and Stephen Cohen, *Discrimination Against Damages For Unlawful Discrimination: The Supreme Court, Congress, and The Income Tax*, 35 Harv. J. on Legis. 447, 503 (1998); *see also, e.g., Klawonn* v. *Mitchell,* 475 N.E.2d 857 (Ill. 1985); *Stover* v. *Lakeland Square Owners Assoc.,* 434 N.W.2d 866 (Iowa 1989); *Gulf Offshore Co.* v. *Mobil Oil Corp.,* 628 S.W.2d 171 (Tex. Ct. App.), *cert. denied,* 459 U.S. 945 (1982); *Estate of Spinosa* v. *International Harvester Co.,* 621 F.2d 1154, 1158 (1980) (following traditional rule in diversity suit); *Selby* v. *Lovecamp,* 690 F. Supp. 733, 736 (N.D. Ind. 1988) (same).

reverse in order to ensure national uniform treatment of the federal tax code under the FELA.

The decision by the Georgia Court of Appeals in this case undermines the principles of federal supremacy and national uniformity under the FELA. Nearly 20 years ago, this Court instructed courts, in a clear and unqualified decision, that it constitutes reversible error (1) to refuse to use a defendant's "easily understood" and "brief" jury charge to instruct a jury as to how correctly to calculate a damages award under the FELA in light of certain tax considerations, and (2) not to base a FELA award on net income. The decision in the court below flatly contradicts this established federal law and is inconsistent with the clear majority of federal courts of appeals, which have correctly applied this Court's binding precedent. Accordingly, the decision below should be summarily reversed on the basis of this Court's holding in *Liepelt*, or at a minimum, the Court should grant the petition and resolve the decisional conflict among the lower courts on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to reverse summarily on the basis of *Liepelt*.

Respectfully submitted,

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October 29, 1998

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APPENDICES

APPENDICES

APPENDIX A

COURT OF APPEALS OF GEORGIA

No. A98A0250

CENTRAL OF GEORGIA RAILROAD COMPANY

v.

MOCK

March 10, 1998

Reconsideration Denied March 25, 1998

JOHNSON, Judge.

Ronald Mock was employed by Central of Georgia Railroad Company ("Central") as a railroad conductor. He sued Central pursuant to the Federal Employers' Liability Act ("FELA") for injuries received while employed by Central. A jury returned a verdict in favor of Mock, and Central appeals. For reasons which follow, we affirm.

The record shows that on September 27, 1991, Mock attempted to remove the end-of-train ("EOT") device while the train was stopped in a joint yard of CSX Transportation and Central. An EOT consists of a body, an 18- to 24-inch stem, an air hose, and an air hose coupling device called a "gladhand." It weighs approximately 35 pounds. According to Mock, the EOT was "stuck" in the car, but he jarred it loose. Mock removed the EOT, raised it to a certain height above his head, then let the EOT

go with his right hand, balancing one end with his left hand, while grabbing the air hose with his right hand. Two other conductors verified that an individual must balance the EOT with one hand while reaching for the air hose with the other hand. Footing is important because the conductor must pivot and turn to the side in performing this task.

Mock testified that the ground was muddy in the track area where he had to work. It had rained nearly three inches at the site two days before Mock was injured, and the track area was "like a mud pond." It usually stayed muddy and "very slick" for three or four days after a rain and had been that way since Mock began work for Central in 1977. Weeds and vegetation in an adjacent ditch next to the railroad tracks partially plugged the culvert. The two railroads that jointly used the yard argued about which should maintain it and how much should be spent on maintenance, so "very little got done." Requests by train employees for drainage rocks went unheeded.

As Mock attempted the balancing maneuver, he lost his footing. He held onto the EOT in an effort to keep from damaging the device, and in so doing, he injured his left shoulder. The railroad brakeman helped Mock put his shoulder back into its socket, and Mock finished the trip. Mock reported his injury to the radio dispatcher and, when he arrived at his destination, informed his supervisor that he had hurt his shoulder. He also spoke to a claims agent the day he left the hospital, while on medication, and informed the agent he was having problems remembering what happened. Mock first mentioned the mud and his loss of footing during a pre-trial deposition.

1. In its first enumeration of error, Central asserts the trial court erred in refusing to grant its motion for directed verdict on Mock's claim for recovery under the drainage regulation. The regulation at issue provides: "Each drain-

age or other water carrying facility under or immediately adjacent to the roadbed must be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned." 49 CFR § 213.33. Central contends Mock failed to prove the ditch would not accommodate expected water flow, that the ditch was immediately adjacent to the roadbed, or that the ditch was the cause of the mud on which he slipped. Without citing any relevant authority to support its argument, Central maintains that expert testimony is required to establish when a drainage and/or other water-carrying facility is sufficiently "maintained and kept free of obstruction, to accommodate expected water flow for the area concerned." We disagree.

"In a FELA case, a directed verdict is possible only when there is a *complete absence* of probative facts supporting the nonmovant's position." (Citation and punctuation omitted; emphasis in original.) *Bagley v. CSX Transp.*, 219 Ga.App. 544, 546(1), 465 S.E.2d 706 (1995). Thus, the question before us is whether there was a complete absence of probative facts supporting Mock's claim against Central under the drainage regulation.

Mock testified that the culvert was partially obstructed at the time of his injury in the same fashion as shown in his exhibits. The railroad individual who was responsible for maintaining the area under the bridge admitted that weeds covered up the ditch immediately adjacent to the track "[a] little bit." According to witnesses, the ditch was "just off the outside" of the track, had always been muddy and slick when it rained, and never drained properly. In addition, Mock presented testimony that there was no ballast between the rails and that Central refused to provide gravel which was requested by the employees in an attempt to rectify the drainage problem. This testimony provides probative facts supporting Mock's position, and the trial court did not err in refusing to grant

Central's motion for directed verdict on this ground. This is not a design defect case, and the fact that Central provided testimony from an expert witness and Mock did not merely goes to the weight of the evidence and is a consideration for the jury, not the appellate court.

2. Central maintains the trial court erred in giving Mock's requested charge concerning the applicability of the federal Safety Appliance Act ("SAA"). 49 USCS § 20301 et seq. If a violation of the SAA results in injury to a railroad employee, the negligence of the employee is not relevant and does not reduce his recovery unless his negligence can be said to be the sole cause of his injury. See 45 USCS § 53. According to Central, the SAA was not applicable in this case because there were no allegations that any of the appliances covered by the SAA caused Mock's injury. According to Mock, the drainage regulation (49 CFR § 213.33) is an SAA standard. While Central admits that the violation of certain railroad safety regulations has been given the same effect as a violation of the SAA, namely the annulling of the employee's negligence unless it is the sole cause of the injury, Central argues that a violation of the drainage regulation does not have that result because this regulation was not enacted for the safety of railroad employees and therefore is not comparable. We disagree.

Under 45 USCS § 431, the Secretary of Transportation has the authority to issue appropriate regulations relating to "all areas of railroad safety[,] supplementing provisions of law and regulations in effect on [October 16, 1970]." The drainage regulation was promulgated by the Secretary of Transportation pursuant to this authority and is part of a group of regulations referred to as "Track Safety Standards." See 49 CFR § 213. It is well established that in certain circumstances, regulations enacted by the Secretary of Transportation have the same force and effect as the SAA, i.e., nullifying an employee's contributory negligence. 45 USCS § 437(c). See *Kernan v. American*

Dredging Co., 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958); *Eckert v. Aliquippa & Southern R. Co.*, 828 F.2d 183 (3rd Cir.1987). In fact, at least one court has held that "a trial court commits reversible error by failing to submit an SAA claim to the jury when a provision of the Act has been violated through a violation of a regulation promulgated thereunder. [Cit.]" *Id.* at 185.

Congressional intent to afford injured railroad employees a remedy against their railroad employers is strong. Thus, we agree that a violation of a regulation promulgated under the SAA constitutes a violation of the SAA. See *Eckert*, supra; *Beissel v. Pittsburgh & Lake Erie R. Co.*, 801 F.2d 143 (3rd Cir.1986), cert. denied, 479 U.S. 1088, 107 S.Ct. 1296, 94 L.Ed.2d 152 (1987). See also *Orchelle v. CSX Transp.*, 574 So.2d 749, 753(2) (Ala.1990) (evidence of a violation of 49 CFR § 232.17 (b)(1), regarding the maintenance of brake equipment on cars, was sufficient to warrant a jury charge on the SAA). "[T]he violation of the regulations constitute[s] a violation of the statutory duty as defined by the Secretary of Transportation pursuant to his rulemaking authority under the SAA. [Cit.]" *Eckert*, supra at n. 4. Since the Track Safety Standards are designed at least in part to protect employees, they are covered by the SAA. Contrary to Central's argument, the SAA does *not* merely cover appliances.

Moreover, although there are apparently no cases on point, it is evident from the standpoint of both legislative intent and prior judicial interpretation that the drainage regulation was enacted to both promote track stability *and* provide a safe working environment for railroad employees. See, e.g., *Black v. Baltimore & O. R. Co.*, 398 N.E.2d 1361 (Ind.App.1980) (complaint seeking Public Service Commission to order railroad to institute program to correct hazard created by muddy condition in which trainmen were required to work was preempted by virtue of provisions of the Federal Railroad Safety Act and cor-

responding federal regulations). Accordingly, the trial court did not err in charging the jury on the SAA.

3. Central next asserts the trial court erred in refusing to give its requested charges concerning Mock's duty to exercise ordinary care, when Central asserted a contributory negligence defense. "[S]imply because a request to charge is apt, correct and pertinent, it is not necessarily error to fail to charge it. The test is whether the court substantially covered the principles embodied therein or whether it was sufficiently or substantially covered by the general charge." (Citation and punctuation omitted.) *Monroe v. Southern R. Co.*, 210 Ga.App. 597, 598(2), 436 S.E.2d 568 (1993). In its charge, the trial court discussed negligence, foreseeability, causation, contributory negligence, the effect of contributory negligence on the recovery, the fact that Mock had to prove negligence before Central was required to prove contributory negligence, and the fact that there must be a causal relationship between Mock's negligence and his injury. The trial court's charge sufficiently and substantially covered the principles of contributory negligence. Thus, the trial court did not err in refusing to give Central's requested charges based on the defense of contributory negligence.

4. Central contends the trial court erred in refusing to give the following charge: "You are instructed that if the plaintiff had a choice of ways of doing a particular job in the course of his employment, one way involving danger and risk of injury to himself and another way that is safe or less dangerous, and he voluntarily chooses the unsafe or more dangerous way, then the employee may be deemed negligent, if the risk of injury was obvious and such as a man of ordinary prudence would have avoided." We find no error in the trial court's refusal to give this charge.

Mock testified that the EOT was "stuck" in the car, but he jarred it loose. He then removed the EOT, raised it to a certain height above his head, and let the EOT go

with his right hand, balancing one end with his left hand, while grabbing the air hose with his right hand. Two other conductors verified that an individual must balance the EOT with one hand while reaching for the air hose with the other hand. According to one conductor, "you've got to grab that hose because it'll be dangling like that, and once it hits you on the knee, you'll—you'll grab it from then on, because it hurts." While Central presented evidence of an alternative way to remove the EOT, there was no evidence that Mock knew of the alternative method.

5. The trial court did not err in refusing to give Central's requested charge that "damages in an FELA case should not be a windfall to a plaintiff or punishment to a railroad." While Central correctly notes that punitive damages are not authorized in an FELA action, such a charge was not mandated in the present case. There was no evidence presented that Mock or his attorneys desired to punish Central or to obtain a windfall. Mock merely presented evidence of his lost wages, impairment of his future earning capacity, his permanent physical impairment, and his pain and suffering.

6. The trial court did not err in refusing to give Central's requested charge that speculative damages and damages based on "future possibilities" were not recoverable. The jury charge given by the trial court substantially and sufficiently covered this principle. During the portion of the charge relating to damages, the court repeatedly informed the jury that it could award damages only for past and future lost wages and benefits and for past and future pain and suffering which Mock was "reasonably certain" to suffer in the future, to lose, to have earned, and so forth. We find no error.

7. Central contends the trial court erred in failing to charge the jury that "[t]he same causation standard—whether the act contributed in any way to the injury—applies both to defendant's negligence and plaintiff's con-

tributory negligence." Once again, this charge was substantially and sufficiently covered in the jury charge given by the trial court. As discussed in Division 3, the trial court exhaustively covered the principles of negligence, burdens of proof, causation, and contributory negligence. The trial court charged the jury that "[n]egligence simply means the absence of or failure to exercise the degree of care required by law to be exercised." The trial court further charged the jury that "if the plaintiff himself was legally partially responsible for the incident which caused his injury, then you would diminish the amount of damages that you otherwise would have awarded in proportion to the amount of negligence that you attribute to the plaintiff, if you find him negligent, whatever you may find that to be from the evidence itself."

Hickox v. Seaboard System R., 183 Ga.App. 330, 358 S.E.2d 889 (1987), does not stand for the proposition that the requested jury charge *must* be given. Rather, *Hickox* merely holds that the FELA cases which allow plaintiffs to reach the jury on a slim showing of negligence also permit defendants to reach the jury on the issue of the plaintiff's negligence with an equally slim showing. In the present case, the issue of Mock's contributory negligence was permitted to go to the jury, and the trial court charged the jury on this issue. This enumeration lacks merit.

8. Central argues the trial court erred in refusing to give Central's request to charge and in giving Mock's request to charge regarding the effect of income taxes on any award to Mock. The jury was instructed regarding reducing any damage award for future lost earnings to their present value and charged that "any amounts that you allow for damages shall not be subject, incidentally, to income tax; therefore, you should neither add nor subtract for income tax when arriving at your verdict." Central objects to the second portion of this charge, contending it was incorrect and prejudicial. According to Cen-

tral, *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), requires that income taxes be subtracted in arriving at the award, whereas the trial court's charge prohibits subtraction. We disagree with Central's interpretation of *Liepelt*.

Liepelt does not *require* that income taxes be subtracted in arriving at an award. *Liepelt* acknowledges that a plaintiff's after-tax income, rather than his gross income before taxes, provides the only realistic measure of his ability to support his family. *Id.* at 493. Without a charge informing the jury that its award will not be subject to income taxes, it is entirely possible that a jury would inflate the award and overcompensate the plaintiff on the basis of the erroneous assumption that the judgment will be taxable. Thus, *Liepelt* holds that it is error to refuse a requested instruction that the jury's award of damages would not be subject to income taxation. Giving this charge negates the necessity of subtracting income taxes from any award of past or future lost wages since the jury is instructed that its award will not be taxed. Accordingly, the trial court did not err in giving Mock's requested charge and in refusing to give Central's requested charge.

9. The trial court did not err in refusing to grant Central's motion for directed verdict on Mock's FELA claim. Contrary to Central's assertion, the evidence did not show that Mock's own negligence was the sole cause of his injuries. As previously stated, in a FELA case, a directed verdict is possible only when there is a complete absence of probative facts supporting the nonmovant's position. *Bagley*, supra. Thus, the question before us is whether there was a complete absence of probative facts supporting Mock's FELA claim against Central.

A review of the record reveals some evidence that Central violated the drainage regulation. There is further evidence that the EOT was awkward and hard to control, that Mock had to use one hand to balance the EOT while

grabbing the air hose with his free hand, and that Mock and other conductors received no training regarding the removal of EOT devices. This evidence is sufficient to enable a rational trier of fact to determine that Central failed to provide a safe working environment for Mock.

Furthermore, we do not find that Mock's testimony should be construed against him. While Mock did not mention the presence of mud when first questioned by the claims agent, Mock explained that he was under medication at the time and that his focus was on his injury, rather than the conditions under which he was working at the time of the injury. It is further undisputed that Mock was never directly asked about the conditions surrounding the incident or mud until his pre-trial deposition, when he was asked where he was standing at the time of the incident. Thus, this case is not controlled by *Shiver v. Norfolk-Southern Ry. Co.*, 225 Ga.App. 544, 545(1), 484 S.E.2d 503 (1997), where the plaintiff made an extensive statement which was totally contradicted by his later testimony. The trial court correctly denied Central's motion for directed verdict on this issue.

10. Central next asserts the trial court erred in refusing to grant a directed verdict on Mock's claim for future lost wages. Central claims Mock failed to sustain his burden of proving future damages with reasonable certainty. We disagree.

Evidence presented showed that Mock suffered a 40 percent physical impairment of his shoulder, which translated into a 24 percent physical impairment of his whole person. Mock is permanently restricted from hanging from a moving train, pushing or pulling more than 30 pounds, and lifting more than 35 pounds. He has persistent pain and is disqualified from his conductor's work. Because of this, he lost 16.5 years of seniority and is now subject to any possible layoffs. While Mock is currently employed as an engineer with Central and is making more money than he did as a conductor, Mock testified that

this job sometimes causes his left arm to hurt and he has to complete tasks using only his right arm. He further testified that he loses $600 to $700 in wages per month because he needs to rest his shoulder from all the activity. In addition, an economist testified as to Mock's lost future income based on his 24 percent impairment. This evidence was sufficient to permit the jury to determine, by a reasonable certainty, Mock's future lost wages. See *Seaboard Coastline R. Co. v. Delahunt*, 179 Ga.App. 647, 651(12), 347 S.E.2d 627 (1986).

11. In its final enumeration of error, Central contends the trial court erred in granting its motion for new trial based on the excessiveness of the jury's verdict. We disagree.

A detailed examination of the evidence bearing on damages in this case does not demand a finding that the jury's $755,000 general damage award was "so excessive as to shock the judicial conscience and raise an irresistible inference that passion, prejudice or another improper cause invaded the trial." (Citations and punctuation omitted.) *Norfolk Southern R. Co. v. Jones*, 219 Ga.App. 602, 608(4), 466 S.E.2d 260 (1995). "Before the verdict will be set aside on the ground that it is excessive, where there is no direct proof of prejudice or bias, the amount thereof, when considered in connection with all the facts, must shock the moral sense, appear exorbitant, flagrantly outrageous, and extravagant. It must be monstrous indeed and such as all mankind must be ready to exclaim against at first blush. It must carry its death warrant upon its face." (Citations and punctuation omitted.) *Id.* at (4)(a), 466 S.E.2d 260.

There was evidence that Mock suffered and is still suffering pain; he had three surgeries related to this incident; his job as an engineer sometimes aggravates his pain and he finds other ways to do his work when his left arm hurts too much; he misses approximately two trips a month because his left arm hurts and he needs to rest it

from all the activities; and playing with his children causes him pain. Mock is permanently restricted from performing certain movements and suffers from a 24 percent permanent physical impairment of his whole person. In addition, Mock lost 16.5 years of seniority because of the injuries sustained. The jury also heard evidence from which it could have calculated Mock's special damages alone to total nearly $323,000. Accordingly, we cannot say that the jury's award of $755,000 is excessive and can be explained logically only as having resulted from an improper cause.

Judgment affirmed.

BIRDSONG, P.J., and SMITH, J., concur.

APPENDIX B

COURT OF APPEALS
OF THE STATE OF GEORGIA
ATLANTA

March 25, 1998

The Court of Appeals hereby passes the following order:

Case. No. A98A0250

CENTRAL OF GEORGIA RAILROAD COMPANY

v.

RONALD MOCK

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

APPENDIX C

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: July 02, 1998

Case No. S98C1132

CENTRAL OF GEORGIA RAILROAD COMPANY

v.

RONALD MOCK

Court of Appeals Case No. A98A0250

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

SHERIE M. WELCH,
Clerk

APPENDIX D

SUPREME COURT OF GEORGIA

Atlanta, July 31, 1998

Case No. S98C1132

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

CENTRAL OF GEORGIA RAILROAD COMPANY

v.

RONALD MOCK

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Fletcher, P.J., and Hunstein, J., who dissent.

APPENDIX E

STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

Case No. 39217

RONALD MOCK

VS.

NORFOLK SOUTHERN RAILWAY COMPANY,
A CORPORATION, f/k/a, a/k/a
SOUTHERN RAILWAY COMPANY;
CENTRAL OF GEORGIA RAILROAD COMPANY

JUDGMENT

This action came on for trial before the Court and a jury, Honorable J. Taylor Phillips, presiding, and the issues having been tried and the jury having rendered its verdict;

IT IS ORDERED AND ADJUDGED that the plaintiff, Ronald Mock recover of the defendant, Norfolk Southern Railway Company, a Corporation, f/k/a, a/k/a Southern Railway Company; Central of Georgia Railroad Company the sum of $755,000.00 with interest thereon at the legal rate as provided by law, and costs of action.

Dated at Macon, Bibb County, Georgia, this 2nd day of April, 1997.

/s/ J. Taylor Phillips
Judge,
State Court of Bibb County

/s/ [Illegible]
Plaintiff's Attorney
124450 bar #

Filed in Office, this 2nd day of April, 1997.

/s/ Ann Griffin
Dep. Clerk

(2)

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-707

In The

Supreme Court of the United States

October Term, 1998

CENTRAL OF GEORGIA RAILROAD COMPANY,

Petitioner,

vs.

RONALD MOCK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court properly:

(1) Required proof of net after-tax and after-employee unreimbursed job costs in arriving at lost wage damages of the plaintiff;

(2) Properly charged the jury that it must follow that evidence in arriving at wage loss damages;

(3) Properly allowed testimony that the jury's verdict was not subject to income tax; and

(4) Properly charged the jury that the plaintiff would not be required to pay income tax on any verdict rendered and consequently the jury should neither add nor subtract from its verdict for income taxes.

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Statute:

45 U.S.C. §§ 51, *et seq.* 2

Rule:

Supreme Court Rule 10 1

Other Authority:

Federal Jury Practice and Instructions, Fourth Edition, Devitt, Blackmar and Wolff, Section 85.17, p. 341 4

Respondent, Ronald Mock, respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the Georgia Court of Appeals' opinion in this case (Pet. 1a-12a). That opinion is reported at 231 Ga. App. 586, 499 S.E. 2d 673 (Ga. Ct. App. 1998).

INTRODUCTION

The Petition for Writ of Certiorari that has been filed in this case cannot withstand scrutiny pursuant to this Court's Rule 10. There is no reason for certiorari because:

(1) The evidence of wage loss was net after-tax wage loss;

(2) Plaintiff's counsel argued for "net" after-tax wage loss damages;

(3) The trial court properly instructed the jury that only wage loss shown by the evidence was to be considered;

(4) The evidence was that the jury's verdict was not subject to income tax;

(5) The trial court properly instructed that the jury's verdict was not subject to income taxes;

(6) The appellate court properly affirmed the trial court's charge; and

(7) The single question framed by the Petitioner is an illegitimate union of two proper actions of the trial court, actions approved by the appellate courts of Georgia and consistent with federal law. That union transposed the trial court's instruction that there was no income tax on the jury's verdict into a charge that no income tax was to be deducted from gross wages.

The trial court properly insisted on proof of net, after-tax, wage loss. The trial court properly charged that the jury must follow that evidence of net, after-tax, wage loss. The trial court properly charged the jury that its verdict was not subject to income tax so the jury ". . . should neither add nor subtract for income tax in arriving at your verdict" (Trial Transcript ("Tr.") 400).

STATEMENT OF THE CASE

A. Background of Testimony:

Respondent, Ronald Mock, filed suit for a Federal Employers' Liability Act ("FELA") injury. Title 45, U.S.C. §§ 51, *et seq.* During the trial of the case, the surgeon chosen by the Petitioner railroad company assessed the plaintiff to have a "24% physical impairment of the whole person." Mock testified to substantial lost work time (Tr. 191, 207). *Central of Georgia R.R. Co. v. Mock*, 231 Ga. App. 586, 592, 499 S.E. 673 (Ga. Ct. App. 1998).

Past and future lost earnings of Respondent Mock were calculated by expert economist Johnson who testified to the following:

> I took 7.8 percent out for expenses. Incidentally, **I took 22.1 percent out for taxes.** So I am reducing . . . the loss by thirty percent to represent taxes and expenses. . . . You take taxes out of it because we want to compensate this individual **not for his gross income but for his net income** (Tr. 259) (Emphasis added).

* * *

> Q. . . . and tell me what amount of money it would take today to alleviate that void of six hundred and fifty dollars per month for the work life expectancy of 22.1 one years in the fashion that you told us about here, taking out inflation, **taking out taxes** . . .
>
> * * *
>
> Q. . . . Now, I want you to make the same calculation, but I want you to take into consideration a twenty-four percent disability impairment rating to the body as a whole, and reduce the 22.1 years by twenty-four percent and give me a figure for that, sir, for the wage rate of 1995.
>
> A. . . . Using the same methodology as employed before?
>
> * * *
>
> The present value amount to compensate for that loss would be $239,138.00 (Tr. 263, 264) (Emphasis added).
>
> * * *
>
> Any amount this jury might give Ronnie Mock is not taxable (Tr. 260).

B. Background of Argument:

The plaintiff's argument as to damages insisted that the jury use only "net" after-tax wage loss in arriving at its verdict:

> . . . His lost wages to-date, gross a hundred and four thousand; net . . . for taxes, eighty-three thousand. (Tr. 363).

C. Legal Background:

The trial court properly charged the jury to follow the evidence as to past and future wage loss damages:

> . . . award a reasonable value of that [past] lost income, if any, **shown by the evidence** to your satisfaction . . . (Tr. 397) (Emphasis added).

> . . . the present cash value of any lost future earnings which you are reasonably satisfied **from the evidence . . .** (Tr. 398) (Emphasis added).

The trial court's *N & W R. R. Co. v. Liepelt*, 444 U.S. 490 (1980), charge was fair to both the plaintiff and defendant and had been approved by *Ybarra v. Burlington Northern, Inc.*, 698 F.2d 147, 153, 154 (8th Cir. 1982):

> Now, any amounts that you allow as damages shall not be subject, incidentally, to income tax; therefore, you should neither add nor subtract for income tax in arriving at your verdict (Tr. 400).

The trial court's *Liepelt* charge is substantially the same as that found in *Federal Jury Practice and Instructions*, Fourth Edition, Devitt, Blackmar and Wolff, Section 85.17, p. 341:

> In the event that you determine to award the plaintiff a sum of money, you are instructed that the award is not subject to any deductions for federal or state income taxes.

The jury had already heard testimony that its verdict was not subject to income taxes (Tr. 260).

The Georgia Court of Appeals addressed and approved the charge of the trial court:

> The jury was instructed regarding reducing any damage award for future lost earnings to their present value and charged that any amounts that you allow for damages shall not be subject, incidentally, to income tax; therefore, you should neither add nor subtract for income tax when arriving at your verdict.
>
> Central objects to the second portion of the charge, contending it was incorrect and prejudicial. According to Central, *N&W R. R. Co. v. Liepelt*, 444 U.S. 490 (100 S. Ct. 755, 62 L. Ed. 2d 689) (1980), requires that income taxes be subtracted in arriving at the award, whereas the trial court's charge prohibits subtraction. We disagree with Central's interpretation of *Liepelt.*
>
> *Liepelt* does not require that income taxes be subtracted in arriving at an award. *Liepelt* acknowledges that a plaintiff's after-tax income, rather than his gross income before taxes, provides the only realistic measure of his ability to support his family. *Id.* at 493. Without a charge informing the jury that its award will not be subject to income taxes, it is entirely possible that a jury would inflate the award and overcompensate the plaintiff on the erroneous assumption that the judgment will be taxable. Thus, *Liepelt* holds that it is error to refuse a requested instruction that the jury's award of

damages would not be subject to income taxation (Pet. 8a-9a).

REASONS FOR DENYING THE WRIT

I.

THERE IS NO COMPELLING REASON TO GRANT CERTIORARI.

The alleged error in this petition concerns a jury instruction. The standard of review is that the trial court's jury instructions must be viewed as a whole (Tr. 383-401). Viewed as a whole, the trial court's instructions were proper and were fair to both parties. Consequently, there is no compelling reason for this Court to grant certiorari. The rule of law in accordance with this Court's decisions in *N & W R. R. Co. v. Liepelt*, 444 U.S. 490 (1980) and *Jones & Laughlin Steel v. Pfeifer*, 462 U.S. 523 (1983), was followed by the trial court in its receipt of evidence and in its charge to the jury.

II.

THERE IS NO REAL DISPUTE.

The trial court's jury instruction properly stated the rule of law. Future wage loss calculations are governed by this Court's holding in *Jones & Laughlin Steel v. Pfeifer*, 462 U.S. 523, 534 (1983) where this Court held that wage losses must be reduced to present value in the exact manner as they were calculated in the present case:

> On the other hand, the injured worker's lost wages would have been diminished by state and federal income taxes. Since the damages award is tax-free,

> the relevant stream is ideally of *after-tax wages and benefits. See Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980). Moreover, workers often incur *unreimbursed costs*, such as transportation to work and uniforms, that the injured worker will not incur. These costs *should also be deducted* in estimating the lost stream.

Id. at 534 (Emphasis added). That wage loss calculation, as shown by the evidence, was clearly made with after-tax dollars. "Unreimbursed costs" were also deducted:

> I took 7.8 percent out for [unreimbursed costs] expenses . . . I took 22.1 percent out for taxes . . . because we want to compensate this individual not for his gross income but for his net income (Tr. 259, 263).

This Court ruled in *N & W R. R. Co. v. Liepelt*, *supra*, that the jury must be instructed that its verdict would not be subject to income taxes:

> It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes and that therefore it improperly inflated the recovery. Whether or not this speculation is accurate, we agree with petitioner that, as Judge Ely wrote for the Ninth Circuit,
>
> > [t]o put the matter simply, giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus

> overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable. *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284, 297 (1975).

> We hold that it was error to refuse the requested instruction in this case. That instruction was brief and could be easily understood. It would not complicate the trial by making additional qualifying or supplemental instructions necessary. It would not be prejudicial to either party, but would merely eliminate an area of doubt . . .

Id. at 497, 498.

In accordance with *Liepelt*, the trial court instructed the jury in the present case that "any amount that you allow as damages shall not be subject to income tax" (Tr. 400). There was no reference to wages or income, gross or net. The reference was to "damages" in terms of "your verdict," i.e., wage loss plus pain and suffering plus disability, etc.

The *Liepelt* holding was to prevent a jury, that knew no better, from inflating its verdict to offset supposed income taxes. Likewise, once the jury is charged that its verdict is not subject to income tax, neither should it reduce its verdict because of supposed income taxes. Consequently, the trial judge prevented any possible confusion by the jury when, after instructing that "any amounts that you allow for damages shall not be subject to income tax," further instructed ". . . therefore you should neither add nor subtract for income tax in arriving at your verdict" (Tr. 400).

The expert witness, an economist, had already made it abundantly clear that income taxes had been deducted from

the plaintiff's wages before arriving at past and future net after-tax income loss and that any amount this jury might award is not taxable (Tr. 259, 263). The Respondent's lawyer had argued for "net" after-tax wage loss (Tr. 363). The trial court had instructed the jury that any award for past lost wages and future lost wages must be "lost income, if any, as shown by the evidence" (Tr. 397, 398). The trial court then cautioned the jury with its *Liepelt* charge that there was a prohibition before rendering its verdict for damages.

III.

THE ASSUMPTIONS OF THE "QUESTION PRESENTED" ARE UNTRUE.

The Respondent's "Question Presented" states that the trial court "expressly instructed" the jury "not to subtract for income taxes." There is no basis in the record for that statement. After charging the jury to follow "the evidence in the case" as to wage loss, evidence which clearly and solely demonstrated after-tax wage loss calculations, the trial court charged the jury that once it had agreed on any "amounts that you allow for damages," it will then neither add nor subtract from that figure because "your verdict" is not subject to income taxes:

> Any amounts that you allow for damages shall not be subject to income tax; therefore you should neither add nor subtract for income tax **in arriving at your verdict** (Tr. 400) (Emphasis added).

The trial court never charged and never allowed proof that past and future wage loss should be based on gross wages. The trial court's charge on no income tax on "any amount that you allow for damages" in no way can be convoluted and isolated from the evidence and the balance of the charge.

CONCLUSION

The Respondent respectfully submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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MOTION FILED
NOV 25 1998

(3)

No. 98-707

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

v.

RONALD MOCK,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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1788

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner, Central of Georgia Railroad Company, has consented to AAR's filing of a brief.[1] Respondent, Ronald Mock, has refused consent.

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association

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[1] The letter expressing consent has been filed with the Clerk of the Court.

representing the nation's major freight railroads and Amtrak. AAR seeks to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.[2]

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, presents such an issue. The court below failed to give a proper tax instruction, in accordance with federal law. Because the tax instruction is crucial to the proper calculation of damages whenever lost earnings are at issue, as was the case here, this erroneous ruling directly and substantially impacted the defendant railroad's liability. Since a plaintiff's lost earnings frequently is a substantial element of damages, such a deprivation of a railroad's substantive rights under FELA is a matter of concern to AAR and its members.

When AAR appears before a court as *amicus curiae* in a FELA case it brings a broad, industry-wide perspective to the issue. This perspective often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole.

Because of its long involvement with FELA, AAR is in an excellent position to address questions arising under that unique statute. AAR conducts an annual survey of the FELA experience of its member railroads, and compiles and maintains the results. This represents, to AAR's knowledge, the most comprehensive database on FELA costs and trends in existence.[3]

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[2] *E.g., CSX Transp., Inc. v. Sirbaugh*, 117 S. Ct. 1289 (1997); *Norfolk & Western Ry. Co. v. Chittum*, 117 S. Ct. 597 (1996); *Metro-North Commuter R.R. v. Buckley*, 117 S. Ct. 380 (1996). All granting motion of AAR to participate as amicus curiae.

[3] *See* ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (published annually).

AAR works closely with its member roads' litigation counsel on problems associated with FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 1,000 attorneys representing railroad companies in personal injury litigation. As a result, AAR is thoroughly familiar with the trends and problems associated with FELA.

AAR's primary interest with regard to FELA in the judicial arena is to prevent courts from expanding railroad liability beyond FELA's intent. Lower courts have displayed a tendency to interpret FELA expansively, at times beyond what is warranted by the statute's language or intent. This problem is compounded by FELA's liberal venue provision, which affords plaintiffs wide latitude in selecting the site of litigation, as well as the ability to bring and maintain an action in state court. Thus, aberrant state court decisions can have a far reaching impact. So long as railroads continues to be subject to this unique compensation scheme, they will avail themselves of their legal rights in an effort to limit their liability, and AAR will support those efforts.

In this case, the lower court's ruling plainly is inconsistent with this Court's decision in *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), and has the potential greatly to increase railroad liability under FELA. Moreover, if allowed to stand, it may impact a significant portion of the railroad industry, not just the individual railroad involved. In this case, as in others, AAR can play a valuable role in bringing the railroad industry's perspective to this Court's attention.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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IN THE

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 per cent of the rail industry's line haul mileage, produces 93 per-

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

cent of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA), enacted by Congress in 1908 to provide a tort remedy for railroad employees injured on the job. FELA predates the no-fault workers' compensation statutes which subsequently were enacted by every state, as well as the federal government, to cover employees within their jurisdiction. The workers' compensation systems provide insurance type benefits, eliminating the notion that recovery for work-related injuries should be conditioned on a showing of employer negligence. Today, the railroad industry is virtually the only one in which work-related injuries are compensated under a fault-based system.[2]

FELA is a costly and litigious system. In 1997, for example, 8,086 FELA lawsuits were brought.[3] In recent years, the cost of FELA verdicts, combined with the cost of defending and settling claims, has risen to $1 billion, or more, annually, rendering FELA a significant cost component of operating a railroad.[4] By all accounts, railroads expend far more on FELA than is spent by private industry in general in payment of compensation to injured employees.[5]

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[2] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[3] ASSOCIATION OF AMERICAN RAILROADS, 1997 CLAIM & LITIGATION REPORT 3-3 (Aug. 1998). ("CLAIM & LITIGATION REPORT"). This report contains data on AAR member railroads' FELA experiences compiled from annual surveys.

[4] During the past five years, the total cost of FELA has averaged $1.128 billion annually. CLAIM & LITIGATION REPORT (calendar years 1993-1997).

[5] Private industry as a whole pays about $0.86 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING

The court below deprived Petitioner of an important substantive right under FELA. By instructing the jury that when calculating damages for lost earnings it should not reduce the plaintiff's award for income taxes, the court undoubtedly assured an award of damages that exceeded the actual losses suffered by the plaintiff. This ruling is contrary to the clear holding of this Court. If permitted to stand and serve as precedent, it has the potential substantially to increase the already high damages paid by railroads under FELA and therefore is of concern to AAR and its members.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in the Petition.

SUMMARY OF ARGUMENT

In *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), this Court ruled that a defendant in a FELA case is entitled to present evidence of the effect of the payment of income taxes on the plaintiff's lost wages, and to have the jury instructed that any award will not be subject to income taxes. The court below ignored that holding by affirming an instruction that the jury must do nothing to take the effect of income taxes into account. This erroneous ruling deprived the defendant of an important substantive right under FELA, a deprivation that directly impacted the amount of damages for which it was liable.

OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY 59 (1995), compared to about $2.00 for railroads. 1994 CLAIM & LITIGATION REPORT at 2-2. *See also* TRANSPORTATION RESEARCH BOARD, COMPENSATING INJURED RAILROAD WORKERS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT 7 (1994) ("Clearly, the higher and more extensive benefits in FELA create higher direct costs for railroads than the same injury would incur under alternative workers' compensation approaches.").

This Court has consistently held that lower courts must follow federal law on issues relating to the calculation of damages in FELA cases, and has reversed lower court decisions that have failed to do so. This Court also has frequently emphasized that FELA must be interpreted uniformly. The decision below violates the principles of FELA interpretation enunciated by this Court and therefore warrants review and reversal.

ARGUMENT

I. THE DECISION OF THE COURT BELOW SHOULD BE REVIEWED OR SUMMARILY REVERSED BECAUSE IN FAILING TO FOLLOW THIS COURT'S *LIEPELT* DECISION IT DEPRIVED PETITIONER OF THE IMPORTANT SUBSTANTIVE RIGHT TO HAVE INCOME TAXES TAKEN INTO ACCOUNT WHEN FELA DAMAGES ARE CALCULATED

The ruling below warrants summary reversal because the Georgia Court of Appeals ignored the clear teaching of this Court in *Liepelt*, violating Petitioner's right to have federal law on the important issue of calculation of damages apply in this FELA case. *Liepelt* held that in FELA cases "[i]t follows inexorably that the wage earner's income taxes is a relevant factor in calculating the monetary loss suffered" by the plaintiff. 444 U.S. at 493-94. Nonetheless, the court below told the jury that income taxes are "irrelevant" by instructing that they "not subtract income taxes" in arriving at an award. Such a ruling transforms FELA into a compensation law that pays rail workers suffering a work-related injury more money while disabled than they would earn back on the job.

A. This Court Has Emphasized the Importance of Lower Courts Following Federal Law on the Issue of Calculating Damages Under FELA

FELA is a unique compensation law that permits railroad employees injured on the job as a result of employer negligence to collect damages for both economic and non-

economic losses suffered. In contrast to the workers' compensation systems that cover the vast majority of other American workers, there are no statutory limits on the damages that may be recovered under FELA.[6] However, it clearly is not the purpose of FELA to make injured employees more than whole if they suffer work-related injuries.[7] Rather, with regard to wages lost as a result of a job-related injury, it is the intent of FELA that the award must compensate only for the actual pecuniary loss suffered. *Liepelt; Michigan Central R.R. v. Vreeland*, 227 U.S. 59, 71 (1913); *Gulf, Colorado & Santa Fe Ry. Co. v. McGinnis*, 228 U.S. 173, 176 (1913) ("The damage is limited strictly to the financial loss thus sustained."); *American R.R. Co. Of Porto Rico v. Didricksen*, 227 U.S. 145, 149 (1913) (same).[8]

Adhering to the principle that FELA awards must be based on the actual loss suffered, this Court ruled in *Liepelt* that a FELA defendant is entitled both to a jury instruction that any damages awarded the plaintiff are not subject to taxes, and to present evidence of the income taxes payable on the plaintiff's past and future income. This assists the jury in determining accurately the plaintiff's actual pecuniary loss when awarding damages

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[6] Workers' compensation laws generally cap weekly benefits. U.S. CHAMBER OF COMMERCE, 1994 ANALYSIS OF WORKERS' COMPENSATION LAWS 22-25, Table VI (1994).

[7] *See e.g., Sinclair v. Long Island R.R.*, 985 F.2d 74, 78 (2d Cir. 1993) (Trial court should have instructed the jury to focus on the difference between what the plaintiff could have earned with his disability and what he would have earned absent the disability.). The courts also have held that FELA recovery is limited to compensatory damages, and punitive damages are not permitted. *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238 (6th Cir. 1971); *Wildman v. Burlington Northern R.R.*, 825 F.2d 1392 (9th Cir. 1987).

[8] *See Williams v. Missouri Pac. R.R.*, 11 F.3d 132 (10th Cir. 1993) (New trial required where the jury award for medical expenses and wage loss far exceeded the evidentiary basis for the awards.)

for past and future lost wages. As the Court noted, "[i]t is his after tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family." 444 U.S. at 493. Thus, to properly assess the measure of FELA damages, the jury must not only be made aware of the non-taxability of the FELA award, it must have the ability to make appropriate adjustments to take it into account.

Liepelt is not the only decision in which this Court has stressed the importance of lower courts applying the proper measure of damages in FELA cases. In *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988), this Court held that Pennsylvania courts could not apply the Pennsylvania prejudgment interest rule in FELA cases since awards of prejudgment interest are not permitted under FELA. The Court explained that " 'the proper measure of damages [under the FELA] is inseparably connected with the right of action,' and therefore is an issue of substance that 'must be settled according to general principles of law as administered in the Federal courts.' " [citations omitted] 486 U.S. at 335. The Court held that "prejudgment interest constitutes too substantial a part of a defendant's potential liability under FELA" to permit it to be awarded as "a mere local rule of procedure." *Id.* at 336.

In *St. Louis S.W. Ry. Co. v. Dickerson*, 470 U.S. 409 (1985), this Court again emphasized the importance of following federal law with respect to the calculation of damages. The Missouri Supreme Court had refused to require a present value instruction on the ground that such an instruction was not provided for under Missouri law. This Court held that "[n]ot only" was the matter "a federal question," it was "one to which existing law provides a clear answer," requiring that damage awards be based on present value. 470 U.S. at 411.[9] Reversal

[9] The determination that future damages under FELA must be reduced to present value had been decided within a decade of

was merited because the Missouri court's refusal to allow instruction of the jury on present value was at odds with federal law.

Like *Dickerson*, this case too presents a lower court addressing a question of federal law in a manner incompatible with the clear answer provided by this Court. The court below, as required by *Liepelt*, instructed the jury that the plaintiff's award would not be subject to taxation but, in the same breath, essentially countermanded that instruction by further instructing the jury not to make any subtraction to take the non-taxability of the award into account when reaching its verdict. This would be tantamount to advising a jury, as required by *Dickerson*, that a FELA award for future damages is received by the plaintiff in a lump sum rather than over a period of years (as plaintiff's lost wages would be received), but to then go on and instruct the jury that it must do nothing to take into this account.

As Petitioner demonstrates, with near unanimity the federal courts have required the reduction of FELA awards for lost earnings by the income taxes to be paid. Pet. Br. pp. 11-12. The odd interpretation given *Liepelt* by the court below, i.e., that the jury must be advised the award is not subject to taxes but may do nothing about it, completely undermines this Court's holding and deprives Petitioner of its rights under FELA. As would adding prejudgment interest to an award or failing to instruct on present value, prohibiting a jury from accounting for the difference between pre-tax and after tax wage loss also would, in many cases, directly and substantially impact the amount of damages for which the defendant is liable.

FELA's enactment in *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916).

B. Damages Under FELA Must Be Calculated Uniformly in All Courts

Rather than leaving the matter of compensating railroad employees to the laws of individual states, by enacting FELA Congress made the deliberate choice of requiring uniformity in the treatment of railroads and their employees. *Second Employers' Liability Cases (Mondou v. New York, N.H. & H. R.R.)*, 223 U.S. 1, 51 (1912); *Liepelt*, 444 U.S. at 493, n.5. Regardless of the jurisdiction where a FELA case is heard, the same substantive law must be applied. *See Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952); *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 (1943); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 (1942). Failing to give proper instructions with regard to the jury's role in considering the non-taxability of a damage award violates the essential principle of uniformity.

In addition to complying with the obligation to carry out the intent of Congress, there are two important practical reasons why it is essential that courts apply FELA uniformly. First, as the result of recent mergers several Class I railroads have greatly expanded their operations, covering numerous states and multiple federal circuits.[10] If FELA is not applied uniformly, in accordance with federal dictates, in and among the state and federal courts, not only will FELA claims filed by employees of different

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[10] The Burlington Northern Santa Fe now operates in 29 states, covering seven federal circuits. The Union Pacific operates in 22 states, covering six circuits. ASSOCIATION OF AMERICAN RAILROADS, PROFILE OF U.S. RAILROADS (1997 ed.). When the Norfolk Southern and CSX take over the operations of Conrail, both those railroads, which today have extensive operations in the Southeast and Midwest, will expand into the mid-Atlantic region and New England. *See* Surface Transportation Board, *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Operating Leases/Agreements—Conrail, Inc. and Consolidated Rail Corporation*, Finance Docket No. 33388 (served July 23, 1998).

railroads be subject to different rules, claims of employees of the same railroad will be subject to different rules.

Maintaining uniformity throughout the nation also is important to discourage forum shopping. Under FELA, jurisdiction is concurrent between state and federal courts and a suit may be filed in any district where the railroad is doing business. 45 U.S.C. § 56.[11] This broad venue rule often provides a railroad employee with several options in choosing a forum, a right which frequently is exercised with the intent of securing a litigation advantage in mind. *See Mobley v. Southern Ry. Co.*, 418 A.2d 1044, 1046 (D.C. 1980) ("plaintiff's choice of forum should be given special deference in FELA cases."); *Petersen v. Ogden Union Ry. & Depot Co.*, 175 P.2d 744, 747 (Utah 1946) (Section 56 gives employees "the right to select the court in which he considers it would be most advantageous for him to bring his action.") Strict enforcement of the requirement that lower courts interpret FELA uniformly and in accordance with federal law will lessen the incentive for plaintiff's to shop for advantageous forums.

Indeed, the issue is acutely presented here where federal courts clearly would have instructed the jury to deduct taxes on lost income, *see Harden v. United States*, 688 F.2d 1025 (5th Cir. 1982), but the state court felt free to reject this precise rule based on a misreading of *Liepelt*. This case thus provides a classic situation where uniformity is critical and this Court should intervene to ensure state court fidelity to federal law in FELA cases.

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[11] Under FELA, the plaintiff truly controls the choice of forum, as suits brought in state court may not be removed to federal court. 28 U.S.C. § 1445(a).

CONCLUSION

On the basis of the foregoing, *amicus curiae* AAR respectfully submits that the petition for writ of *certiorari* to review the judgment of the Georgia Court of Appeals should be granted or, in the alternative, that the decision below be summarily reversed.

Respectfully submitted,

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FILED
NOV 30 1998
CLERK

(4)

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No. 98-707

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

v.

RONALD MOCK,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

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REPLY BRIEF FOR THE PETITIONER

The petition in this case poses an important federal question affecting the uniformity of jury award calculations under the Federal Employers Liability Act ("FELA"): Whether the trial court failed to follow settled federal law as established by this Court in *Norfolk & Western Ry. Co.* v. *Liepelt*, 444 U.S. 490 (1980), by refusing to instruct the jury in a FELA action that damages awarded for lost wages must be based on net, after tax wages rather than gross wages. Significantly, respondent does not even remotely dispute petitioner's assertion that under *Liepelt* (1) a jury must subtract taxes on earnings from gross wages in arriving at an award for lost wages under the FELA, and (2) a trial court may not

refuse to use a defendant's "easily understood" instruction to a jury as to how correctly to calculate a damages award in light of certain tax considerations. Instead, respondent argues that the instruction used by the trial court in this case is consistent with *Liepelt*, despite the trial court's express order to the jury that "you should neither add *nor subtract* for income tax when arriving at your verdict." *Central of Georgia R.R. Co.* v. *Mock*, 499 S.E.2d 673, 678 (Ga. Ct. App. 1998) (emphasis added). Moreover, respondent simply hides from the express holding of the court below that "*Liepelt* does not require that income taxes be subtracted in arriving at an award" under the FELA. The straightforward issue before the Court then is whether the trial court's instruction upheld by the court of appeals complied with the mandate of *Liepelt* that the correct measure of damages should be reduced to reflect income taxes not paid. Because the instruction was not faithful to the rule in *Liepelt*, this case is particularly appropriate for summary reversal.

1. Respondent advances several arguments to support his assertion that the trial court's refusal to use petitioner's concise and easily understood jury charge was legally permissible under *Liepelt*. These arguments, however, boil down to the same contention: Because some of respondent's evidence of lost wages was calculated on an after-tax basis, the jury somehow knew that it must award lost wages net of taxes, despite the trial court's explicit direction to the contrary. Respondent's contention is wrong for two reasons. First, respondent's presumption that the jury verdict was calculated on an after-tax basis is not supported by anything in the record. The general verdict provides no basis for determining what the jury did in measuring damages. Second, because the Court must presume that the challenged instruction had a concrete impact on the jury's ability correctly to assess and award damages, the question of the validity of that instruction under *Liepelt* is therefore squarely presented in this case.

Respondent argues that "there is no compelling reason to grant certiorari" because the trial court's jury instruction and receipt of evidence were "in accordance with this Court's decision in [*Liepelt*]." Respondent's argument is merely a conclusory assertion that provides no basis for ignoring the clear holdings below. In the first place, regardless of the evidence, the jury simply was not given correct instructions on what to do with the evidence before it in arriving at an award. Indeed, the trial court expressly ordered the jury not to subtract taxes. Thus, the trial court's charge to the jury did not comply with the primary teaching of *Liepelt* that the vital purpose of FELA instructions should be "[the elimination] from the deliberations of juries 'an area of doubt or speculation that might have an improper impact on the computation of the amount of damages.'" *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486-87 (1981) (quoting *Liepelt*, 444 U.S. at 498).

Second, respondent's characterization of the evidence is misleading. Although respondent's expert made some calculations relying on an after-tax basis, respondent also presented evidence, including W-2s and tax returns, from which both gross wage loss and net wage loss could be calculated.[1] Moreover, in closing arguments, counsel for respondent claimed lost wages of $104,000 gross or $83,000 net. Opp. 4. By ordering the jury *not* to sub-

[1] Even if all of the evidence had been based on after-tax calculations, which it was not, it would still have been possible (and under the jury instruction necessary) for the jury nevertheless to have arrived at an award that did not "subtract" for taxes. *See, e.g., Gwinnett Commercial Bank* v. *C&S Bank*, 262 S.E.2d 453, 456 (Ga. Ct. App. 1979) ("The jury is not compelled to accept the testimony of an expert witness as to value even where there is no other evidence of facts and data upon which the jury might base an independent conclusion."); Tr. 386 ("Even though you're allowed to receive the testimony of experts, you're not bound by such testimony."). Here, of course, the raw numbers were before the jury and it could readily make a pre-tax calculation as required by the judge's instructions.

tract taxes at arriving at an award, the trial court directly instructed the jury to ignore the evidence on after-tax earnings. Moreover, the fact that the trial court correctly explained to the jury that the final award would not be subject to income tax is irrelevant to the court's failure to ensure that the jury derived the lost wages component of its award solely on an after-tax basis. The Court can only assume that the exorbitant $755,000 jury verdict was calculated on the basis of gross earnings as mandated by the trial court's instruction—precisely the result prohibited by *Liepelt*.

Finally, respondent incorrectly argues that "the assumptions of the 'question presented' are untrue" because "there is no basis in the record" for petitioner's statement that the trial court "expressly instructed the jury not to subtract for income taxes in reaching a verdict." The jury instruction could not be plainer: "you should neither add *nor subtract* for income tax when arriving at your verdict." Thus, if the Court agrees with petitioner that *Liepelt* stands for the proposition that "any verdict in favor of the plaintiff for loss of earnings should be calculated on the basis of his net earnings, that is, the earnings left to him after the payment of income taxes," Pet. 4 (quoting proposed jury instruction), then this case provides the perfect vehicle to uphold that rule of law. The trial court erred in refusing to so instruct and the court of appeals compounded the error by affirming.[2]

2. Respondent does not dispute petitioner's interpretation of *Liepelt*; nor does respondent dispute that this case presents an important federal question. See Brief of

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[2] Respondent's reliance on *Ybarra* v. *Burlington Northern, Inc.*, 689 F.2d 147 (8th Cir. 1982), as agreeing with the court below, does nothing but demonstrate that this case is not aberrational and thus further justifies action by this Court. With respect to the dozen cases cited in the petition that conflict with the holdings in *Ybarra* and the courts below, respondent simply ignores them. The conflict among the lower courts thus could not be more stark.

Association of American Railroads as *Amicus Curiae* at 3, 7-9. Thus, the only question is whether this case is appropriate for review by this Court. The very fact that the Georgia Court of Appeals itself chose to issue a written decision determining whether the trial court properly applied the law reveals that the court of appeals believed the question presented here was squarely raised by the jury instruction. Although the court of appeals correctly understood the significance of the question presented, its explicit holding that "*Liepelt* does not *require* that income taxes be subtracted in arriving at an award," *Central of Georgia*, 499 S.E.2d at 678; Pet. App. 9a (emphasis in original), could not be more flatly inconsistent with the holding in *Liepelt*. Moreover, by affirming the trial court's instruction, the court of appeals plainly recognized that the trial court prohibited the jury from subtracting income taxes from lost wages in arriving at an award, which was fully consistent with its own incorrect understanding of *Liepelt*. The Georgia Court of Appeals' misunderstanding of this Court's mandates in *Liepelt* is now the law in Georgia (as well as the Eighth Circuit), and is in direct conflict with the vast majority of federal appellate courts. Therefore, this case presents particularly compelling reasons for the Court, at a minimum, to grant the petition for a writ of certiorari to correct the legal error of the Georgia Court of Appeals. Because there is no dispute between the parties as to the legal principles established in *Liepelt*, this case is also particularly suitable for summary reversal.

CONCLUSION

For the foregoing reasons and those stated in the petition and the amicus brief of the Association of American Railroads, the petition for a writ of certiorari should be granted. The Court may wish to reverse summarily on the basis of *Liepelt*.

Respectfully submitted,

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November 30, 1998

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